No. 87-1830

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LARRY BLALOCK,

Petitioner,

-v-

METALS TRADES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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I. QUESTIONS PRESENTED

A. Did the court below err in holding that after the petitioner proved through direct evidence that respondent had intentionally discriminated against the petitioner under Title VII of the 1964 Civil Rights Act, the respondent could escape all liability if it could prove by a preponderence of the evidence that petitioner would have been treated in the same way in the absence of discrimination?

B. Did the court below err by not properly applying this Court's decision in Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S. Ct. 1504 (1985) by holding that the trial court's finding was not clearly erroneous?

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II. GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

A. Opinion Below

The case at bar was appealed on two separate occasions to the Sixth Circuit Court of Appeals. The first opinion is reported at 775 F.2d 703 (6th Cir. 1985). The opiniion following remand is unpublished, Case No. 86-4021, and appears in the appendix at 1a.

B. Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Petitoner seeks review of a decision of the Sixth Circuit Court of Appeals, affirming the District Court's judgment for respondent following remand, rendered on November 30, 1987. (Appendix A, 1a). A Request for Rehearing With a Suggestion For a Rehearing En Banc was denied by the Sixth Circuit Court of Appeals on January

28, 1988 (Appendix B, 11a). The decision of the United States District Court for the Southern District of Ohio, Eastern Division was filed on October 10, 1986. (Appendix C, 13a)

III. STATEMENT OF THE CASE

The case which was brought pursuant to 42 U.S.C. 2000e (Title VII of the 1964 Civil Rights Act), alleged that defendant discriminated against plaintiff-petitioner Larry Blalock (hereinafter petitioner) in discharging him on account of his religion.

Plaintiff began his employment with defendant-respondent Metals Trades (hereinafter respondent) in March of 1974. Metals Trades is a closely held corporation owned by two principal shareholders: President Wendall Woodward, and Vice President Arnold Brewer (Trial Transcript, Vol. II., p.

5). Wendall Woodward considers himself a born-again Christian who was led to the Lord by his spiritual leader, John Rothacker (Vol I, p. 6). Woodward testified that he considers John Rothacker to be an Apostle; that is, one with spiritual authority and ultimate authority in the church. (Vol. I, p. 7.) Mr. Woodward considers himself in submission to Apostle Rothacker. (Vol. I, pp. 53-54.) Both Woodward and Rothacker testified that it is impossible to separate one's spiritual life from one's work life. (Vol. I, p. 7.)

Although Rothacker was never employed by respondent, he participated in the decision-making process at Metals Trades and used his influence with Mr. Woodward to introduce petitioner to Mr. Woodward at a morning prayer session conducted by Rothacker. (Vol. II, p. 8, 10.) Mr. Rothacker helped Mr. Blalock get the job

at Metals Trades on a part-time basis initially so that Mr. Blalock would also have time to observe Mr. Rothacker's ministry.

Petitioner and Mr. Rothacker had a falling out, because petitioner would not submit to Rothacker's authority and would not accept Rothacker as an apostle. (Vol. I, p. 59, 60, 110.) Wendall Woodward subsequently learned of the falling out and was dismayed by it. (Vol. I, pp. 17, 67.) Woodward stated on one occasion that there "...was a schism in the body of Christ. I don't like that. I want it stopped, and want it stopped now." (Vol. I, p. 112.) Woodward also, on a regular basis, gave petitioner messages from Mr. Rothacker, the usual content of which was that petitioner was rebelling against the

authority of John Rothacker. (Vol. I, p. 112, Vol. II, p. 26.)

A spiritual prayer group, which was called the "Body of Christ", participated in the decision to terminate petitioner. This group, which was led by John Rothacker and of which Wendall Woodward was a member, met every Sunday morning for prayer and religious discussion. (Vol. I, p. 8.) Mr. Woodward went to the group on the Sunday before he discharged the petitioner and asked the group how he should handle the situation with the petitioner. (Vol. II, p. 11.) The consensus of the group, which was considered to be the Word of God, was that Mr. Woodward should try to present problems to the petitioner and that if they could not resolve them, he should consider laying the petitioner off. (Vol I, p. 16-23.)

Mr. Woodward met with the petitioner after working hours on Tuesday, September 16, 1974. (Vol. I, pp. 24, 114.) Mr. Woodward initiated the conversation by telling the petitioner that he wanted to talk to him about something. (Vol. I, p. 115.) Blalock indicated he would only discuss work related matters; he said he did not want to discuss religious differences any further. (Vol. I, pp. 25, 116.) The evidence is uncontradicted that Woodward did not mention work-related matters at the meeting and that he concluded the conversation with the statement that Mr. Blalock should "consider himself laid-off until the situation with John Rothacker is resolved." (Vol. I, p. 11, Vol. II, p. 21.)

When asked at trial what he meant by this statement, Mr. Woodward revealed his motivation by stating, "...in order to

have his [Blalock's] work attitudes change around to where he could be a productive employee that he was going to have to get the situation straightened out between him and John first. (Emphasis added) (Vol. II, p. 22.)

The petitioner tried to be rehired. He called Mr. Woodward on the telephone and tried to discuss the job on a business only basis. (Vol. I, pp. 121, 31.) Mr. Woodward said that religion and the job were inseparable. (Vol. I, p. 121.) Mr. Woodward would only consider talking with the petitioner about his job if he straightened out problems with the religious leader and talked about spiritual matters.

The respondent presented evidence that it had problems with some aspects of Mr. Blalock's work. Mr. Woodward and Mr. Brewer, President and Vice-President of

the defendant, stated that Mr. Blalock spread papers over their desks, that he failed to call in to notify them of the days on which he would work, and that he worked too close to tolerances. (Vol. II, pp. 24, 51.) However, it appeared from the testimony of Mr. Brewer and Mr. Woodward that these problems were minor. Mr. Brewer testified that he considered the cluttered desk situation a minor problem. (Vol. II, p. 51.) He said that Mr. Blalock did not have a phone on his desk, which required Mr. Blalock to use the desks of Mr. Woodward and Mr. Brewer. (Id.) Mr. Brewer said that he brought any problems to Mr. Blalock in a friendly way. (Vol. II, p. 54.) He never made a big issue of these complaints. (Vol. II, p. 53.) He told Mr. Blalock that he was doing a good job and never told him that he was doing an unsatisfactory job. (Vol. II, pp. 68, 69.) Mr. Brewer never

received any complaints from customers about Mr. Blalock's work. (Vol. II, pp. 54, 67.) Neither he nor Mr. Woodward ever disciplined Mr. Blalock prior to the termination, nor did either of them tell Mr. Blalock that he would or might be disciplined if his work did not improve. (Vol. I, p. 15, Vol. II, p. 67.)

Mr. Brewer indicated that he was dissatisfied with Mr. Blalock's work from the very beginning. But Mr. Woodward would not discharge the petitioner so long as he followed the religious leader. Furthermore, Mr. Brewer did not make the ultimate decision to discharge the petitioner. Mr. Woodward did.

The trial court entered judgment for respondent. The trial court concluded that respondent did not intentionally discriminate against petitioner because of his religion or religious beliefs.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which reversed. Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985) (Blalock I). The Court of Appeals held that the trial court had erred in concluding that defendant had not discriminated against the plaintiff on the basis of religion.

The appellate court based its decision on the following facts:

1. That Mr. Woodward had an enhanced toleration of Blalock because of shared religious beliefs and that when there was a break in religious ties, Mr. Woodward discharged the petitioner. Blalock I, supra, at 708. As the District Court pointed out, and as the Court of Appeals emphasized in its finding of discrimination, the actual discharge was caused by the break in religious ties between the petitioner and his

supervisor, Mr. Woodward. As the Court of Appeals stated, "a break in their religious ties caused the entire web (of work, religion, and personal relationship) . . . to collapse." Id. Prior to the break in religious ties, Mr. Woodward was willing to tolerate what he considered to be deficiencies in Mr. Blalock's work performance. However, after the break in religious ties, "[p]laintiff could no longer rely upon Mr. Woodward's enhanced tolerance to save his job." Id. The appellate court considered that treating "Blalock differently at different times depending upon Blalock's current religious views . . . is the essence of discrimination." Id.;

2. The plaintiff "was not actually fired until he refused to discuss Rothacker" (Woodward's apostle); Id.;

3. Woodward testified that when he said in a letter to the Ohio Civil Rights Commission that one of the reasons Blalock was fired was because he refused to answer a question, he meant that Blalock refused "to discuss his situation with Rothacker"; Id., at 708-709;

4. "Woodward admitted telling Blalock that he should consider himself discharged until he reconciled himself with Rothacker", Id., at 709; and

5. "When Blalock attempted to regain his job, Woodward refused to discuss the matter separately from religion." Id.

The Court of Appeals also noted that the case was one of mixed motivation; that although petitioner had shown that religion was a motivating factor in the discharge, the respondent had presented some evidence that it had discharged petitioner for legitimate non-discriminatory reasons. The Court of

Appeals held that after the petitioner presented evidence that one factor in the discharge was unlawful discrimination, the burden then shifted to the respondent to show by a preponderance of evidence that the petitioner would have been discharged even if there had been no discrimination.

On remand, the trial court heard no additional evidence but again found for respondent. The trial court concluded that "the defendant has proved by a preponderance of the evidence that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination." (Opinion and Order of October 10, 1986, attached in Appendix C at 13a.) The trial court stated that even though religion played a part in the discharge, the petitioner was actually discharged

because of the petitioner's poor job performance and insubordination towards his employers.

The case at bar was appealed again to the Court of Appeals for the Sixth Circuit, which in a two to one decision affirmed the decision of the trial court. The majority of the Court of Appeals held that the trial court's conclusion that defendant "had 'proved by a preponderance of the evidence that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination'" was not "clearly erroneous". (Per Curiam Opinion of November 30, 1987, Appendix A, at 1a.)

Judge Contie, who wrote the Court's opinion in Blalock I, stated in his dissent in Blalock II that Woodward's conclusory testimony that he made the decision to discharge Blalock for "strictly secular or work related

problems" is "implausible in light of the admissions made by Woodward at trial." (Appendix A, at 8a.) As Judge Contie pointed out, Woodward "admitted that at the time of the discharge he told Blalock that he wanted to talk to him about John Rothacker;" that Blalock would have to "get the situation straightened out between him and John first" before he could be a productive employee; and that "until he got things resolved with Mr. Rothacker he was laid off." (Appendix A, at 9a.) Judge Contie further stated that:

> Woodward's admission that Blalock'sjob was contingent on reconciliation with Rothacker leads to the conclusion that Blalock would not have been fired if he did not have a falling out with Rothacker, and that he could have regained his job if he resolved his differences with Rothacker. In the face of these admissions, the district court found that Blalock would have been fired at the same time even absent the

> impermissible factor of religious discrimination -- i.e., his split with Rothacker. Given the evidence, I believe that this finding is implausible. (Appendix A, at 9a.)

Petitioner filed a Petition for rehearing, which was denied on January 28, 1988.

IV. REASONS FOR GRANTING CERTIORARI

A. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THE CASE AT BAR IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS, INVOLVES IMPORTANT ISSUES OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT, AND THE ISSUES IN THIS CASE ARE SIMILAR TO THOSE IN THE CASE OF HOPKINS V. PRICE WATERHOUSE, IN WHICH THIS COURT RECENTLY GRANTED CERTIORARI. ___U.S.___, 56 U.S.L.W. 3601 (Sup. Ct. 1988)

There are two reasons why this Court should grant a writ of certiorari in this case. The Court of Appeals has issued a decision which is in conflict with decisions of many other courts of appeals. This Court should resolve the conflict. Secondly, the Court of Appeals

has decided an important question of federal law which has not been, but should be, settled by this Court.

The Court of Appeals for the Sixth Circuit decided in the case at bar that if the plaintiff proves that one of the reasons for an employment decision violated Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e), the defendant is not liable if it can prove by a preponderance of the evidence that it would have treated the plaintiff in the same way absent discrimination. 775 F.2d at 712, and 713, n. 13. The trial court applied the rule that was originally established in Blalock I and held that defendant proved by a preponderance of the evidence that defendant would have discharged plaintiff in the absence of discriminatory reasons for the discharge. The Court of Appeals in Blalock II held that the district

court's finding that defendant has met its burden by a preponderance was not clearly erroneous.

The standard in "mixed motivation" cases enunciated by the Sixth Circuit Court of Appeals is contrary to the standard that has been established by other Courts of Appeals, including the D.C. Court of Appeals in the case in which this court recently granted certiorari. Price Waterhouse v. Hopkins, cert. granted, ___U.S.___, 56 U.S.L.W. 3601 (Sup. Ct. 1988).

The Eighth Circuit Court of Appeals held that liability is established under Title VII if the plaintiff proves that discriminatory motive "played some part in the employment decision." Bibbs v. Block, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc). The Ninth Circuit Court of Appeals in a opinion written by now -

Justice Kennedy held that defendant was liable if plaintiff showed that "sex was a significant factor in the decision." Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984).

Thus, two courts of appeals have held that liability was established in mixed motivation cases if plaintiff proved that discriminatory motive was a factor in the decision. The burden did not shift in order for there to be a determination of liability. The burden only shifted to the defendant to present evidence that plaintiff would not have received the job or would have been discharged anyway in the absence of discrimination. Such evidence was relevant, according to the Eighth and Ninth Circuit Courts of Appeals, to show that plaintiff was not entitled to a job or backpay.

The District of Columbia and Fourth Circuit Courts of Appeals have held that if the plaintiff proved that discriminatory motive was a factor in the decision, the burden shifted to the defendant to prove "by clear and convincing evidence" that "the unlawful factor was not the determinative one." Hopkins v. Price Waterhouse, 825 F.2d 458, 471 (D.C. Cir. 1987), cert. granted, ____U.S.____, 56 U.S. L.W. 3601 (S. Ct. 1988) (emphasis in opinion). See, Smallwood v. United Airlines, Inc., 728 F.2d 614, 620 (4th Cir. 1984).

The Eleventh Circuit Court of Appeals has applied the same standard in mixed motivation cases as did the Sixth Circuit Court of Appeals in the case at bar. See, Miles v. M.N.C. Corp., 750 F. 2d 867, 875-876 (11th Cir. 1985).

This Court should grant certiorari in the case at bar, just at it has agreed to

grant certiorari in Hopkins v. Price Waterhouse, supra, to resolve the conflict among the circuits concerning the important issue of the respective burdens of proof in mixed motivation employment discrimination cases.

This case should assist the Court in deciding the standard to be used in mixed motivation cases, because this case points out the problems in allowing the defendant to rebut direct evidence of discrimination by only a preponderance of the evidence- even though petitioner established overwhelming discrimination, respondent was relieved of liability by some evidence of past dissatisfaction with the plaintiff and a statement at trial that defendant did not discriminate. This case shows how easy it is for a defendant to overcome proof of discriminatory conduct when the

preponderance of evidence standard is used.

If this Court were to grant certiorari this Court could decide whether a plaintiff would prevail upon a showing that a factor in the decision was discriminatory and whether evidence of other grounds for the decision could be used by defendant in proceedings on relief, rather than during the liability stage. This important issue would not be decided by this Court's decision in Hopkins, supra.

Furthermore, this Court should grant certiorari, or at least hold this case in abeyance pending resolution of Hopkins, for if the Court did not do so, petitioner would lose according to a standard that the Court might hold is an erroneous one.

Petitioner submits that this court should hold that in cases in which

plaintiffs prove that a motivating factor for defendant's decision is discriminatory, liability is established. As the Ninth Circuit Court of Appeals has indicated, this Court has held that the plaintiff in an employment discrimination case may prevail "by persuading the court that a discriminating reason more likely motivated the employer." Fadhl v. City and County of San Francisco, supra, at 1166, quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981) (emphasis added). Furthermore, as the Eighth Circuit Court of Appeals has held, Congress in Title VII "has made unlawful any kind of racial discrimination, not just discrimination that actually deprives him of the job." Bibbs v. Block, supra, at 1323. The broad language of Title VII and cases that have

interpreted the statute distinguish Title VII cases from First Amendment cases that have applied the "but for" causation analysis that this Court laid down in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977).

The issue of whether a plaintiff has met the objective qualification for the job has in the past been considered relevant on the issue of relief but not during the liability stage. Courts considered defendants liable if discriminatory motivation was a factor, and Courts looked at objective qualifications during the relief stage. See, Bibbs v. Block, supra, at 1323 and cases cited therein. As the Eighth Circuit Court of Appeals held, the language of 42 U.S.C. §2000e-5(g), the relief section, provides that a plaintiff will not receive backpay if he/she was

discharged "for any reason other than discrimination on account of race, color, religion, sex or national origin...." See, Bibbs v. Block, supra, at 1322. There is no such provision in the liability section of Title VII, 42 U.S.C. §2000e-2.

If the holding of the Sixth Circuit Court of Appeals remains the law, virtually every case will become a mixed motivation case, and plaintiffs will rarely be able to prevail in Title VII cases even when they prove discriminatory conduct. Defendants will be able to merely assert at trial that their decisions to discharge were based on legitimate reasons and prevail, even though they made direct statements that they acted because of racial or religious bias. If the defendant is allowed to prevail by getting into other possible

non-discriminatory reasons for its actions, Title VII will be diluted. It will no longer mean that all intentional discriminatory conduct is prohibited, but only that such conduct is prohibited if other, possibly more important motivations are not present. The ruling of the Sixth Circuit Court of Appeals leaves trial courts with the almost impossible task of trying to determine whether the discriminatory motivation is more important than the nondiscriminatory motivation in order to determine whether there is a violation of Title VII.

In the alternative, this Court should require defendants in mixed motivation cases to have an onerous burden; to require defendants to prove by clear and convincing evidence that the plaintiff would have been treated in the same way, absent discrimination.

The Sixth Circuit Court of Appeals had the right idea in Blalock I but came to the wrong conclusion. As the Court of Appeals stated, "the fact that plaintiff's case has already been established before the burden shifts, emphasizes the difficulty of the employer's burden." Blalock v. Metals Trades, Inc., 775 F.2d at 712. The Court of Appeals erred in allowing defendants to overcome the burden by a mere preponderance of the evidence, rather than requiring a showing of clear and convincing evidence, when a plaintiff has already shown that he has been discriminated against. A requirement of a preponderance of evidence allows a trial court, like the trial court in the case at bar, to conclude that a defendant has met its burden with nothing more than evidence of some past dissatisfaction with the plaintiff's performance and a

bald articulation that the defendant did not discriminate.

B. THE COURT BELOW DID NOT PROPERLY APPLY THIS COURT'S DECISION IN ANDERSON V. CITY OF BESSEMER CITY, N.C., 470 U.S. 564, 105 S.Ct. 1504 (1985) IN HOLDING THAT THE TRIAL COURT'S FINDING WAS NOT CLEARLY ERRONEOUS

The Sixth Circuit of Appeals erred by not properly following this Court's teaching of Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 105 S.Ct. 1504 (1985). The decision of the trial court is couched in terms of credibility determinations even though the key witness testimony was uncontradicted. The trial court's decision is a classic example of a situation that this Court stated should be subjected to particularly close scrutiny by a reviewing court.

In the instant case, the district court has perhaps attempted to insulate

its findings from review by denoting them credibility determinations. The court was not faced with the task of weighing conflicting, contradictory witness testimony. As stated, the evidence on key facts is undisputed. In its October 10, 1986 Memorandum and Order, the trial court termed the defendant's witnesses "extremely credible". (The court in its 1984 Memorandum and Order stated that Mr. Woodward was merely "credible").

The trial court apparently based its determination on essentially one portion of Mr. Woodward's obviously self serving testimony:

> Q. As you saw it, the feigned obedience that was revealed to you, did that apply to spiritual matters or work matters or both?
>
> A. The spiritual aspect of it never entered into it. It was strictly secular or work related problems that the feigned obedience struck me.

* * *

October 10, 1986 Memorandum and Order at 5. (Emphasis added by trial court).

This Court has held that a fact finder's reliance on the aforementioned type of self-serving, conclusionary testimony which is plainly contradicted by the overwhelming weight of the evidence is clear error:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. ____, 105 S.Ct. 844, 83 L.Ed.2d ____ (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on

> its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Anderson v. City of Bessemer City, N.C. 105 S.Ct. 1504, 1512 (1985).

Mr. Woodward's statements are unsupported by any objective evidence; his testimony is a post facto articulation of his dissatisfaction with Mr. Blalock's work performance and like the evidence in Anderson, is internally inconsistent and implausible.

The most significant evidence of a defendant's explanation for why it fired a plaintiff is often what it says around the time of the discharge. In the instant case, Mr. Woodward did not at the time he discharged Mr. Blalock tell Mr. Blalock that he was doing a bad job or that he had been insubordinate to his employers. He did not, as the

uncontradicted evidence reveals, talk about work-related matters. Instead, Mr. Woodward testifed that he told Mr. Blalock that he would be fired, if he would not talk about Mr. Woodward's religious apostle, Mr. Rothacker. He furthermore admitted as Judge Contie recognized, that Mr. Blalock would be laid off, unless he could resolve matters with the religious apostle. Mr. Woodward admitted at trial that "... in order to have his [Blalock's] work attitudes change around to where he could be a productive employee that he was going to have to get the situation straightened out between him and John first." (Emphasis added.) (Vol. II, p.22.) (Appendix D) Further Mr. Woodward admitted that, at the time of the discharge, he told Mr. Blalock that "until he got things resolved with Mr.

Rothacker he was laid off." (Vol. II, p. 21.)

As Judge Contie recognized, Woodward's admission that Blalock's job was contingent on reconciliation with the Apostle Rothacker leads to the conclusion that Blalock would not have been fired absent a falling out with Rothacker. It also shows that Blalock could have regained his job if he resolved his differences with Rothacker.

The evidence of the parties' conduct and conversations following the termination supports Judge Contie's conclusions that petitioner's job performance was not the reason for the termination. When one considers Mr. Blalock's contacts with Mr. Woodward after the discharge, the trial court's finding that Mr. Blalock would have been fired for legitimate reasons is particularly implausible. Mr. Woodward

was willing, after Mr. Blalock was fired, to continue to discuss Mr. Blalock's being re-employed by Metals Trades. After his "lay-off", Mr. Blalock scheduled a meeting, at the urging of his pastor, with Mr. Woodward, Mr. Rothacker, and various other clergy members, to discuss his employment situation. Mr. Woodward stated in his notes that summarized the conversations which occurred at that meeting that:

> As of now, the problem still exists and Larry is still laid off. How the Lord will move now to clear up the situation is clearly in his hands. Pl. Ex. 4.

Mr. Woodward also noted his own impression at the start of the meeting:

> "[It was] almost as though he would break down on the spot and repent." Id.

The word "repent" indicated that Mr. Woodward was really concerned about the religious differences between the two of

them. The statement that "as of now the problem still exists" and the notation that "Larry is still laid off" shows that Mr. Woodward was still willing to re-employ Mr. Blalock, if they could overcome their religious problems.

Furthermore, the uncontradicted evidence is that plaintiff called Mr. Woodward after his termination in order to discuss the job on a "business only basis". Mr. Woodward would not talk with Mr. Blalock, unless spiritual matters were included. This telephone conversation between Mr. Woodward and Mr. Blalock shows that Mr. Woodward was willing to talk with Mr. Blalock about future employment, if Mr. Blalock would talk about spiritual matters, particularly John Rothacker. If Mr. Blalock's work was so intolerable that he would have been discharged for work

related reasons, why was Mr. Woodward willing to talk with Mr. Blalock about future work? Presumably, Mr. Woodward would not have been interested in considering Mr. Blalock for re-hire. Also, one would think that if poor work performance, or attitude, or insubordination, was determinative in the decision to discharge, that Mr. Woodward would have mentioned such matters during Mr. Blalock's attempts to regain his position, or would have reprimanded or disciplined him during his employment. Such discipline never occurred.

Lastly, it is interesting to note in this connection, that Mr. Woodward was given an opportunity by the trial court to explain what he meant about Mr. Blalock's having to resolve the situation with Mr. Rothacker. Mr. Woodward stated that one cannot separate one's work from one's religion. If Mr. Woodward, at a

time after Mr. Blalock had sued him for religious discrimination and after considerable time for reflection, could not separate religion from the decision to discharge, one wonders how the trial court could do so.

CONCLUSION

For the foregoing reasons this Court should grant certiorari and have this case argued along with Price Waterhouse v. Hopkins, supra, to resolve the important issue of the burden of proof in mixed motivation Title VII cases and to require the Court of Appeals to properly apply Anderson v. City of Bessemer City, N.C., supra. In the alternative, this Court should hold this case in abeyance until after the Court's decision in Hopkins.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-4021

LARRY BLALOCK,
Defendant-Appellant,
v.
METALS TRADES, INC.,
Defendant-Appellee.

DECIDED AND FILED
United States Court of Appeals
Sixth Circuit
November 30, 1987

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Before: Martin and Nelson, Circuit Judges, and Contie, Senior Circuit Judge.

Per Curiam: Martin, Nelson, Circuit Judges, concurred. Contie, Senior Circuit Judge, (pp.) delivered a separate dissenting opinion.

PER CURIAM. This is an appeal from the second judgment entered by the district court in favor of defendant

Metals Trades, Inc. The first such judgment was reversed by this court in a decision reported at 775 F.2d 703 (6th Cir. 1985). The basic facts of the case are set forth in that decision, and we shall not repeat them here. On remand, the district court reviewed the record of the trial (a trial that had been conducted by the court without a jury), heard oral argument on the proper disposition of the case in light of this court's opinion, and addressed the question whether plaintiff Blalock's work performance was seen by defendant Metals Trades as being so poor that Mr. Blalock would have been discharged even if he had never departed from his initial religious views. After reviewing the evidence and making findings as to the credibility of Mr. Woodward, the key actor in the discharge, the district court concluded that the defendant employer had "proved

by a preponderance of the evidence that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination." We cannot say that this finding was clearly erroneous, and we shall therefore affirm the judgment of the district court.

The court found that Mr. Blalock's performance on the job left much to be desired from the very outset - as Mr. Brewer, one of the principals of Metals Trades, recognized early on. For one thing, Mr. Blalock had a flexible work schedule, devoting only two or three days a week to his job as a salesman at Metals Trades, and it was important that he let his superiors know, in advance, when he was going to be working; he repeatedly failed to apprise the company of his projected schedule, and this created a significant problem because customers

calling in to speak with Mr. Blalock could not be told when he would be able to get back to them. For another thing, Mr. Blalock used the desks of his superiors, and had a habit of leaving the desks in a mess. He had a patronizing attitude that others found offensive, he wasted too much time agonizing over insignificant mechanical tolerances, and his performance was deficient in other respects. His superiors repeatedly urged him to change his ways, and he repeatedly promised to do so, but didn't. It seems clear from the record that Mr. Blalock's tenure might well have been shorter than it was but for his religion. The district court thought Mr. Blalock's religion did not entitle him to immortality at Metals Trades, and we agree.

It is true that Mr. Woodward, one of the two men responsible for deciding

whether Mr. Blalock would stay or go, was a deeply religious person who felt - as millions of adherents of a variety of religions feel - that there was a spiritual dimension to many of his secular activities and decisions. Mr. Woodward sought divine guidance on his problem with Mr. Blalock - a circumstance that probably worked in Mr. Blalock's favor for a period of time - and the final decision to terminate Mr. Blalock's employment came after Mr. Woodward, having come across the phrase "feigned obedience" in one of the psalms, realized that Mr. Blalock was "feigning obedience" when he promised to correct his poor work habits without having any intention to do so. It is not illegal to discharge an unsatisfactory employee who repeatedly promises to improve his performance but fails to do so, and a legal discharge

does not become illegal simply because it is explained in language taken from the King James version of the Bible or because a reading of the Bible happens to focus the employer's thoughts on the nature of the problem. If Mr. Woodward had been moved to fire a demonstrably lazy employee after reading the biblical verse that says "Go to the ant, thou sluggard; consider his ways, and be wise," we take it that tne employer's reading habits would not have rendered the discharge illegal.

It is true that Mr. Blalock's refusal to discuss a reconciliation with the religious leader John Rothacker played a part in the discharge, and the district court might well have been justified in interpretating the evidence as showing that Mr. Blalock would not have been discharged but for his falling out with Mr. Rothacker. The district court saw

and heard the witnesses as they testified, however, and we did not; the district court "found Woodward to be an extremely credible witness and [the court] fully accept[ed] his testimony that he made the decision to discharge Blalock for 'strictly secular or work related problems.'" The district court found as a fact that "it was Blalock's poor work performance and his insubordinate or 'feigned obedience' attitude towards his employers that caused him to be discharged," and we have no basis for concluding that the district court's factual findings were clearly erroneous. Under Rule 52, Fed.R.Civ.P., the findings may not be set aside on appeal. Cf. Goostree v. Tennessee, 796 F.2d 854, 861 n. 2 (6th Cir. 1986), cert. denied, 107 S.Ct. 1374 (1987).

AFFIRMED.

CONTIE, Senior Circuit Judge, dissenting. The majority has determined that the district court's finding that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination was not clearly erroneous. I do not agree.

The majority and the district court have placed great weight on Woodward's conclusory testimony that he made the decision to discharge Blalock for strictly secular or work related problems. I believe, however, that this testimony and the district court's findings are implausible in light of the admissions made by Woodward at trial.

At trial, Woodward admitted that at the time of the discharge he told Blalock that he wanted to talk to him about John Rothacker. In explaining what he meant by this, he gave the following testimony: "[s]o I kind of felt in my own heart, in

my own mind, that in order to have his work attitudes change around to where he could be a productive employee that he was going to have to get the situation straightened out between him and John first." Further, Woodward admitted that, at the time of the discharge, he told Blalock that "until he got things resolved with Mr. Rothacker he was laid off." Woodward's admission that Blalock's job was contingent on reconciliation with Rothacker leads to the conclusion that Blalock would not have been fired if he did not have a falling out with Rothacker, and that he could have regained his job if he resolved his differences with Rothacker. In the face of these admissions, the district court found that Blalock would have been fired at the same time even absent the impermissible factor of

religious discrimination -- i.e., his split with Rothacker. Given the evidence, I believe that this finding is implausible.

Because I believe that evidence shows that Blalock would not have been discharged had he reconciled with Rothacker, I would find that the district court's findings are clearly erroneous. Accordingly, I would reverse the district court's judgment and remand with instructions to enter judgment for plaintiff and to determine damages.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.

LARRY BLALOCK,
Plaintiff-Appellant,
v.
METALS TRADES, INC.,
Defendant-Appellee.

ORDER

Filed In The
United States Court of Appeals
For The Sixth Circuit
John P. Hehman, Clerk
January 28, 1988

BEFORE: MARTIN AND **NELSON,** Circuit Judges, and **CONTI,** Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been

referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX C

ENTERED BY ORDER OF THE COURT Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-80-86

LARRY BLALOCK,
Plaintiff

v.

METALS TRADES, INC.,
Defendant

MEMORANDUM AND ORDER

This case was remanded to this Court for further findings and for clarification of the allocation of the burden of proof. Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985). Subsequent to the remand, the Court heard oral argument on the proper disposition of this case consistent with the opinion of the Sixth Circuit. During the period following the oral argument, the Court has reviewed the record and the

applicable law in order to set forth the following findings of fact and conclusions of law.

I.

Defendant Metals Trades is a closely held corporation principally owned by Wendall Woodward and Arnold Brewer and is engaged in the business of small metal fabricating. Woodward and Brewer each own 50 of the 101 shares of stock of Metals Trades. The remaining share is owned by Woodward's brother Evan. Wendall Woodward and Arnold Brewer jointly manage the business, and major decisions are made only after the two have reached agreement. One area subject to joint control is the hiring and firing of office personnel.

Plaintiff Blalock was introduced to Woodward by John Rothacker, a self-described "apostle." Woodward described

Rothacker as his spiritual shepherd, but Woodward maintained that Rothacker only gave him spiritual advice and that the ultimate decision in any secular matter remained Woodward's. Rothacker's testimony confirmed that, in secular matters, he might give advice or counsel to Woodward, however, "the decisions ultimately reside with" Woodward.

Blalock met Rothacker in 1972 or 1973 and became interested in observing Rothacker's work. Blalock had always been active in the Christian ministry and wanted to observe Rothacker. Rothacker was aware of Blalock's background in aeronautical engineering and that Blalock was interested in a sales position. In early 1974, Rothacker learned that Woodward might be interested in an individual with some engineering experience. In March of 1974, Rothacker arranged an early morning prayer meeting

which both Blalock and Woodward were invited to attend. Following the prayer meeting, Rothacker introduced Blalock and Woodward and suggested that Blalock might meet Woodward's requirements. That same morning, Blalock was invited to an interview with Woodward and Brewer at Metals Trades.

A few days later, Blalock was interviewed by Woodward and Brewer. At the interview, Blalock expressed an interest in working part-time, two to three days a week, so that he could have time to practice his ministry. Blalock also requested permission to "witness" his faith to clients who expressed an interest in religious matters. At the close of the interview, Woodward told Blalock that Metals Trades was a "Christian company" and that the Bible

was the rule book. Blalock was hired by Metals Trades on a part-time basis.

Within three to four weeks after Blalock started working at Metals Trades, he and Rothacker had a parting of the ways. Blalock testified that he split with Rothacker because he was unwilling to submit to Rothacker's authority. Rothacker, "being an apostle," felt Blalock owed a certain amount of obedience, which was not forthcoming. Blalock testified that during work hours Woodward "harassed" him with "religious accusations of rebellion against God." Woodward testified that he did not recall relaying acrimonious messages from Rothacker to Blalock. Blalock was not terminated after his break with Rothacker, but continued to be employed at Metals Trades for several months.

Brewer testified that he wanted to discharge Blalock soon after he started

working at Metals Trades, and Woodward confirmed this testimony. Brewer testified that Blalock had a patronizing attitude, a habit of spending too much time agonizing over insignificant mechanical tolerances, a habit of leaving a mess on Brewer's desk, and failing to call in to tell Metals Trades when he would be working. Brewer testified that Blalock's failure to call in was a significant problem because it made it difficult for Metals Trades to tell customers calling to speak to Blalock when he would return the call; from Brewer's view, the customers had to be served first. Although Blalock testified that Brewer asked him just two weeks before his discharge if he would consider working full time, Brewer testified that he did not request that Blalock go to full time.

Brewer did not think that Blalock would become a good employee at Metals Trades, while Woodward testified that he thought Blalock might fit in at Metals Trades in time. Woodward wanted to give Blalock more time because, in Woodward's view, Blalock was "a good, moral, ethical man, and that's the kind of person that I have to have working at Metals Trades, especially calling on customers." Woodward testified that from time to time he and Blalock discussed the problems Metals Trades had with Blalock's conduct and that Blalock always received these discussion very well. Blalock's performance would improve immediately after these discussions, but then he would resume his old habits within the next week.

Woodward hoped that Blalock would become a good employee of Metals Trades. After six months of Blalock's employment

and with the constant recurrence of the same problems with Blalock, Woodward finally concluded that Blalock apparently was not going to correct his problems:

Q. From your testimony yesterday, I gather that there was some point in time where you felt that you were given some insight into what Larry's problem was.

A. Well, like I said, I had been praying about it for weeks and never, ever really got any direction from the Lord.

In the meanwhile, Arnold [Brewer] continued to put pressure on me, and the situation, I felt, was getting critical, because I just wasn't getting direction. I didn't really know what to do.

And like I said, one Sunday morning while having devotions, I received a portion of the Scripture from the Bible that -- it was like turning a light bulb on. I realized immediately that that's exactly what Larry was doing. The passage was Psalm 66, and it said that they had feigned obedience, because of Thy great power, they have feigned obedience to Thee.

And immediately when I read that I realized that's exactly where Larry was, because he would -- in my presence, he would always concur and agree, but then as soon as he left my presence I think he completely forgot about it. And -- that's it.

Q. As you saw it, the feigned obedience that was revealed to you, did that apply to spiritual matters or work matters or both?

A. The spiritual aspect of it never entered into it. It was strictly secular or work related problems that the feigned obedience struck me. It was the fact that we asked him repeatedly to call in, and he would do so maybe the next week, but then immediately go back to his old pattern again of not calling in.

And the business of him using everybody's desk in the office never did cease. But when you spoke to him about, it he would agree to it and go back to his desk, but then a day or two later, he'd be back to the same old thing of spreading stuff all over the place against.

(emphasis added). The day after Woodward came to this realization concerning Blalock's insubordination he discussed

discharging Blalock with Brewer, who happily assented.

Blalock was discharged the following day. At about 5:05 p.m. Woodward told Blalock that he wanted to talk to him. Blalock immediately asked it it concerned Rothacker and Woodward responded that it did. Blalock said he did not want to discuss it if it concerned Rothacker. According to Woodward, Blalock immediately left the room. Woodward admitted that he told Blalock "until he got things straightened with John [Rothacker], he was discharged." Blalock testified that he did not leave immediately, but stated that while he would discuss work matters, he would not talk about Rothacker. Blalock testified that Woodward agreed to talk only about work, but then never mentioned work-related problems; instead, Blalock testified that Woodward kept making

reference to "feigned obedience." Blalock then collected his papers from his desk and told Woodward he was leaving. Blalock testified that at that point Woodward said, "consider yourself laid off...until the situation with you and John Rothacker is settled." Woodward testified, however, that his statement about Rothacker was "simply my reaction to his reaction" and that he never meant to condition employment on Blalock's relationship with Rothacker. Blalock subsequently telephoned Woodward in an attempt to recover his job. Blalock testified that he asked Woodward to talk only about their business relationship and leave religion out of it, but that Woodward refused to do so.

Two letters from Woodward to the Ohio Civil Rights Commission were introduced into evidence. In the first, Woodward

stated that "we were generally satisfied" with Blalock's performance of his sales duties. The letter expressed some displeasure, however, with Blalock's attitude and his engineering practices. A second letter states that Blalock was laid off because of the failure to notify Woodward which days he would be working and because Woodward asked him "a question and he refused to answer." Woodward testified that this referred to Blalock's refusal to discuss Rothacker when he was discharged. The letter then states:

> Larry was hired with the full knowledge and understanding that Metals Trades is a Christian Company and our rule book is the word of God, or the Bible. He was in full accord and very excited. He said he wanted to work for a Christian Company and, being a salesman contacting new accounts, he wanted to witness to them; in which I encouraged him. Larry is a fine young man and he has my respect in many areas. I hated to lay him off as there are all too few

> men willing to commit themselves to Jesus -- especially salesmen. Larry's problem is that he refuses to submit himself to those in authority over him and the Bible makes it clear that we are to be in submission. Larry was let go for strictly secular reasons but the root of his problem is spiritual, as the scriptures will show....

The letter closed by quoting several biblical passages.

II.

After pointing out that the evidence suggests the possibility of dual motives for plaintiff's discharge, this case was remanded by the Court of Appeals in order to permit this Court to clearly articulate its allocation of the burden of proof under the framework set forth in Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274 (1977). The Court of Appeals held that in order to prove a violation of Title VII in a case of this nature,

> a plaintiff need demonstrate by a preponderance of the evidence that the employer's decision to take an adverse employment action was more likely than not motivated by a criterion proscribed by the statute. Upon such proof, the employer has the burden to prove that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action.

Blalock, 775 F.2d at 712. The Court of Appeals found that Blalock demonstrated "that Blalock's change in his religious views was at least a factor in the discharge," Id. at 709, and "that religious discrimination was a motivating factor in his discharge," Id. at 713. The Court of Appeals then stated that under the Mt. Healthy analysis such a finding does not settle the matter, because

> Metals Trades may avoid all liability by showing that even had Blalock maintained his initial religious views, his

> work performance was so intolerable to Metals Trades that he still would have been discharged.

Id. at 713 (note omitted).

III.

Given the Court of Appeals' determination that religious discrimination was a factor in Blalock's discharge, the defendant was required to show by a preponderance of the evidence that it would have taken the same action absent the proscribed conduct. The Court, after carefully reviewing the evidence, finds that the defendant has proved by a preponderance of the evidence that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination.

A.

Employment decisions are often difficult to analyze, involving as they

frequently do an assessment of various factors concerning an individual's ability and character. As the Court of Appeals recognized:

> [E]mployment decisions are often complex, and, where dozens of factors are involved in evaluation of an employee, the fact that one such factor is impermissible does not necessarily preclude the contention that the adverse employment action would have been taken regardless of the impermissible factor.

Blalock, 775 F.2d at 712.

The Supreme Court has recognized that the existence of one impermissible factor in an employment decision is not cause to find that a decision is fatally flawed, and further, an employee should not be placed in a better position by virtue of engaging in constitutionally protected conduct than if the employee had done nothing. As the Supreme Court observed in Mt. Healthy:

> The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the mployment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Mt. Healthy, 429 U.S. at 285-86 (emphasis added).

B.

The Court of Appeals found that plaintiff satisfied the first part of the Mt. Healthy test by showing that religious discrimination was a factor in Metals Trades discharge of Blalock. The Court of Appeals described the situation at Metals Trades as follows:

> It is no doubt true that "Woodward tolerated conduct and

attitudes on the part of plaintiff that he may not have tolerated with an employee with whom he did not share such a personal relationship," and that it was only when "this relationship broke down [that] Woodward no longer felt motivated to close his eyes to plaintiff's attitudes and behavior." These findings, however, reveal that religion played a role in Blalock's discharge. The district court found that Woodward treated Blalock differently at different times depending upon Blalock's current religious views. This is the essence of discrimination. Woodward was willing to give special consideration to those persons who shared his religious views, but, when Blalock's religious views changed, Woodward no longer gave Blalock this special consideration.

In addition to the district court's own findings, other evidence in the record reveals that religious discrimination played at least a role in the employment decision. Blalock was not actually fired until he refused to discuss Rothacker. In a letter to the Ohio Civil Rights Commission, Woodward asserted that one reason for the discharge was Blalock's refusal to answer a question. Woodward testified, however, that this referred to Blalock's refusal to

> discuss his situation with Rothacker. Woodward admitted telling Blalock that he should consider himself discharged until he reconciled himself with Rothacker. When Blalock attempted to regain his job, Woodward refused to discuss the matter separately from religion. All of these factors make it very clear that Blalock's change in his religious views was at least a factor in the discharge.

Blalock, 775 F.2d at 708-09.

After a careful review of the record and based upon the Court's assessment of the credibility of the witnesses, the Court is left with the firm conclusion that, although religion did play a role in Blalock's discharge, it was not the actual cause of the discharge. The actual cause of the discharge was Blalock's poor performance on the job and an attitude of insubordination toward his employers. The poor performance -- Blalock's failure to notify his employers when he would be working and his repeatedly leaving a mess on Brewer's

desk -- caused Brewer to want to discharge Blalock long before Brewer's partner, Woodward, finally consented to the discharge. The insubordination stemmed from Blalock's disregard of his employers' requests that he correct these work-related problems. Although Blalock would superficially agree to do so, in actuality he would ignore his employers' requests. The Court found Woodward to be an extremely credible witness and fully accepts his testimony that he made the decision to discharge Blalock for "strictly secular or work related problems."

Much of the difficulty in this case stems from the fact that Woodward, a deeply religious person, sought guidance and insight from his religious beliefs and the Bible in reaching decisions concerning the conduct of his affairs,

including the operation of the business and the employees of the business. He found in his reading of the Bible a reference to "feigned obedience" which caused him to realize that -- translated into the secular world -- this was what Blalock nad been doing to his employers, i.e., agreeing with his employers to correct his poor work habits but then quickly returning to his poor work habits. In Woodward's view, Blalock's problem was that "he refuses to submit himself to those in authority" and, to Woodward, this was evidenced not only by Blalock's insubordinate attitude toward his employers but also by his insubordinate attitude toward Rothacker. In the Court's view, this accounts for Woodward's comments to Blalock about "feigned obedience" and getting things straightened out with Rothacker -- he believed that it was necessary for

Blalock to change his insubordinate attitude before he would ever be a good employee. The critically important fact, however, is that it was Blalock's poor work performance and his insubordinate or "feigned obedience" attitude toward his employers that caused him to be discharged.

Thus, while, as the Court of Appeals pointed out, "Blalock's change in his religious views [his refusal to obey the "disciple" Rothacker] was at least a factor in the discharge," Blalock, 775 F.2d at 709, this must be considered in the context of all of the evidence. Woodward saw Blalock as being not only disobedient to Rothacker but also disobedient to his employers toward whom he "feigned obedience." While Woodward indeed may have tolerated Blalock's poor work habits more than he should when

Blalock professed to share the same religious beliefs (and perhaps as a result discriminated against other employees), the decision to discharge Blalock resulted not from simply the differing religious views but - more importantly -- from an awareness that Blalock's poor work habits would not change in spite of Blalock's repeated assurances that he would correct the problems. To use the language of the Supreme Court in Mt. Healthy, Blalock's protected conduct (his change in religious views and insubordination to "disciple" Rothacker) simply made Woodward "more certain of the correctness of [his] decision." Mt. Healthy, 429 U.S. at 285-86.

The fact that Woodward reached the conclusion to discharge Blalock from Woodward's reading of a passage in the Bible does not mean that the discharge

was the result of religious discrimination. In Woodward's views, the biblical phrase "feigned obedience" triggered a realization on his part that the insubordinate attitude of Blalock and his "feigned" assurances to correct his problems at work would not change. Woodward had resisted his partner Brewer's desire to discharge Blalock, even after Blalock's religious disagreement with Rothacker, in the hope that Blalock would become a good employee. Blalock's change in his religious beliefs - specifically, his refusal to submit to the authority of Rothacker -- did play a role in Woodward's decision in that it confirmed - in Woodward's mind -- what the "feigned obedience" meant. Blalock was no longer "obedient" to Rothacker, but, more importantly, Woodward realized that

Blalock would never be obedient to his employers, i.e., he would never correct the problems with his work that had been repeatedly called to his attention. Thus, while Blalock's refusal to follow the "apostle's" directions was, as the Court of Appeals pointed out, at least a factor in the discharge, it was not the determinative cause of the discharge. The determinative cause was Woodward's realization that Blalock would continue to refuse to follow his employer's directions to correct his problems at work. To the extent that Woodward felt that Blalock's insubordination to Rothacker was a factor in the decision it was, of course, an impermissible factor, but even without this factor the decision to discharge Blalock -- for poor work performance and insubordination ("feigned obedience") to his employers -- would have been made at the same time.

In reaching this conclusion, this Court is fully aware of the difficulty in discerning motivations of employers in cases such as this,[1] especially where both employer and employee carry their respective religious beliefs into the workplace and where both consciously inject their religious beliefs into their respective responsibilities. This Court, as noted earlier, found Woodward to be an extremely credible witness and, for the reasons stated, finds -- in response to the Court of Appeals' inquiry, Blalock, 775 F.2d at 713, -- that even if Blalock had maintained his initial religious views, his work performance was so intolerable to Metals Trades (Brewer and Woodward) that he still would have been discharged at the same time.

IV.

JUDGMENT is hereby entered in favor of the defendant.

IT IS SO ORDERED.

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[1]As the Court of Appeals very recently observed, "Causation in the Title VII context is an elusive concept." Goostree v. State of Tennessee, 796 F.2d 854, 863 (6th Cir. 1986).

APPENDIX D

Tr.I, 15:
[Testimony of Wendall Woodward]

Q. Didn't you tell Mr. Blalock you were satisfied with his work?

A. I'd have to qualify that, but I would say generally, yes.

Q. Well, I want to refer you again to the deposition in which the question was: Did you ever tell Mr. Blalock that he was going a good job?

A. No.

Q. Okay. And the answer: I can't remember them -- or, I can't remember that. I told him that I was satisfied.

Do you recall that testimony?

A. I don't recall it, but if I said it, then I agree to it.

Q. That's a correct statement, isn't it?

A. If that's what I said, yes.

Q. Would it also be correct to say that prior to the time that Mr. Blalock was fired, you never told him that if he did not improve that he would be disciplined and fired?

A. No, I don't think I ever told him that.

* * *

Tr.I, 24-25:

Q. And didn't you also tell Mr. Blalock that until he got things resolved with Mr. Rothacker he was laid off?

A. That's right.

Q. And at that time, he was, in fact, laid off, was he not?

A. Yes.

* * *

Tr.II, 21-22:

THE COURT: Mr. Woodward, in response to his question, "Does it involve John," your answer was, "Yes"?

THE WITNESS: Yes, it was.

THE COURT: In what way did you feel it involved John?

THE WITNESS: Well, it -- I don't believe you can separate a man from -- I don't believe you can compartmentalize your life and say, "This happens on Sunday, I go to church here and this happens on a workday." I belive that what you are, your're a total man, and the input from the church and family and every phase of your life is what you are totally as a result -- in my case, I'm 54 years old and what I am

is a sum total of my experiences in 54 years, and I don't believe that that can be separated out.

His problem with John manifested itself in the work place almost immediately. There was a good relatiohsip between Larry and I early on when it first started, but when he had the problem with John, then his attitudes in the office changed drastically towards me. So I kind of felt in my own heart, in my own mind, that in order to have his work attitudes change around to where he could be a productive employee that he was going to have to get the situation straightened out between him and John first.

* * *

Tr.I, 30-32:

Q. Now, the note under October 30, 1974, indicates that Larry Blalock called. Now, Larry's referred to as Larry Blalock; isn't that correct?

A. Probably.

Q. And he called you on the phone, didn't he?

A. Yes.

Q. And then he said he wanted to talk about going back to work at Metals Trades, didn't he?

A. Yes.

Q. And he said that he wanted to talk with you on a work basis and leave out the spiritual; isn't that correct?

A. Yes.

Q. And your notes reflect that; isn't that true?

A. Yes.

Q. And when he said that, you refused, did you not?

A. Yes.

Q. You, in effect, refused to talk about the work and leave out the spiritual aspects; isn't that true?

THE WITNESS: Can I say more than just a yes?

THE COURT: Yes.

A. Yes, I refused primarily because -- you have to remember the conditions and terms that Larry requested when he came to work at Metals Trades. He said he wanted to work for a Christian company, number one; and he said he wanted to be able to witness when he made calls, which was not a request of mine. It was one that he asked for. And in the things that he did subsequently, he violated that agreement with me and -- I forgot the point I was trying to make. Excuse me.

Q. But you refused to talk to him then, because he did not want to talk about the spiritual matter?

A. Yes, because I don't feel that you can separate -- in Larry's case, in particular, I don't think you can separate the two, because it was a voluntary agreement that he made when he came to work at Metals Trades. It was nothing I imposed on him.

* * *

Tr.II, 67-69:
[Testimony of Arnold Brewer]

Q. Okay. And isn't it true that you never gave Larry any written reprimand?

A. That's correct.

Q. You never gave him any warning?

A. That's correct.

Q. Larry was never suspended as a result of any of those problems?

A. That's correct.

* * *

Q. In fact, Mr. Brewer, in your conversations with Larry concerning his job performance, didn't you tell him that he was doing all right?

A. I never praised the man. I never knocked him except for those items that I've told you about. I know I never praised him.

Q. Didn't you tell him he was doing all right, though?

A. I possibly told him that he was doing all right, but not praised him; real proud of him, in other words.

APPENDIX E

42 §2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with

reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such, individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

No. 87-1830

Supreme Court, U.S.
FILED
MAY 26 1988
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CLERK

In The
Supreme Court of the United States
October Term 1987

LARRY BLALOCK,

Petitioner,

v.

METALS TRADES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

A. Did the petitioner timely file a petition for a writ of certiorari to challenge the decision of the Court of Appeals in Blalock v. Metals Trades, 775 F.2d 703 (6th Cir. 1985) filed October 24, 1985?

B. Did the Court below correctly apply this Court's decision in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) to the case at bar by holding that the trial court's finding was not clearly erroneous?

DISCLOSURE OF CORPORATE AFFILIATION

Pursuant to Rule 28.1 of the Supreme Court it is stated that respondent Metals Trades, Inc., is not a parent company, subsidiary or affiliate of any other corporation.

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GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

I. OPINIONS BELOW

The case at bar was appealed on two separate occasions to the Sixth Circuit Court of Appeals. The first opinion was filed on October 24, 1985 and is reported at 775 F.2d 703 (6th Cir. 1985). The unpublished opinion following remand was filed on November 30, 1987, in Case No. 86-4021, (P. App. 1a).[1] A request for Rehearing With a Suggestion for a Rehearing *En Banc* was denied by the Sixth Circuit Court of Appeals on January 28, 1988. (P. App. 1a) The decision of the United States District Court for the Southern District of Ohio, Eastern Division was filed on October 10, 1986. (P. App. 13a)

II. JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). Petitioner properly seeks review of the second decision of the Sixth Circuit filed November 30, 1987, however this Court has no jurisdiction to review the decision filed October 24, 1985 since the petition was not timely filed.

———o———

STATUTES WHICH THE CASE INVOLVES

28 U.S.C.A. § 2101(c)

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or

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[1]In this brief "P. App." denotes the appendix to the petition for certiorari.

proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

———o———

STATEMENT OF THE CASE

Because petitioner is attempting to have this Court make a factual review of this case it is necessary to present in some detail the rather complicated facts presented in the trial of this matter.

At all times pertinent to this lawsuit, defendant Metals Trades was a corporation engaged in small metal fabricating, owned by two principal shareholders, Wendell Woodward and Arnold Brewer. (Wendell Woodward at TR II-3) Mr. Woodward was the president of the corporation while Mr. Brewer served as vice-president. (*Id.*) Messrs. Woodward and Brewer shared the management duties of the business including the hiring and firing of employees. (Wendell Woodward at TR II-7, 8, 9) Sometime prior to March 1974, John Rothacker, aware of an employment opportunity at Metals Trades, introduced plaintiff, who was then unemployed, to Wendell Woodward. (John Rothacker at TR I-64) Shortly thereafter, in March 1974, plaintiff began working for defendant primarily as a sales representative. (Larry Blalock at TR I-96)

The religious beliefs of plaintiff were not a prerequisite to his employment with defendant; (Larry Bla-

lock at TR I-142, 147) however, plaintiff was aware at the time he went to work for defendant that Wendell Woodward was a "born again" Christian who ran his company as a "Christian company." (Larry Blalock at TR I-98) Plaintiff also professed to be a practicing Christian and expressed his pleasure in working for a company that adhered to Christian principles. (Larry Blalock at TR I-147) At or before the time he began working for defendant, plaintiff asked for and was given permission to witness his faith to the company's clients or customers. (Larry Blalock at TR I-147)

Prior to Mr. Blalock's association with Metals Trades, both he and Wendell Woodward had independently become associated with John Rothacker. Mr. Woodward considered Mr. Rothacker to be his spiritual leader, "shepherd," or "apostle." (Wendell Woodward at TR I-7; John Rothacker at TR I-54) Although Woodward sought advice from Rothacker on all areas of his life, the final decision on every matter, including business, was always Woodward's. (Wendell Woodward at TR II-10) Both Mr. Rothacker and Mr. Woodward were associated with a small group of Christians who met on a regular basis. Mr. Rothacker had no involvement in Metals Trades; however, Metals Trades regularly gave him a portion of its income as a "company tithe." (Wendell Woodward at TR I-8, 9)

Prior to Mr. Blalock's employment with defendant, he too became acquainted with Mr. Rothacker and expressed his desire to study the ministry with him. (John Rothacker at TR I-57) For a short time, Mr. Blalock was an "understudy" of John Rothacker and followed him in

his ministry. However, shortly after Mr. Blalock began working at Metals Trades, Mr. Rothacker terminated his relationship with Mr. Blalock because of plaintiff's rebellious attitude and his refusal to submit to the authority of Mr. Rothacker in his ministry. (John Rothacker at TR I-62)

Approximately one month after plaintiff commenced his employment at Metals Trades, Arnold Brewer became dissatisfied with plaintiff's work and conduct. (Wendell Woodward at TR II-10; Arnold Brewer at TR II-55) He expressed this dissatisfaction to Wendell Woodward and indicated he was inclined to terminate plaintiff. (*Id.*) Wendell Woodward, although not fully satisfied with plaintiff's job performance and conduct, discouraged the termination of Mr. Blalock. Because Mr. Blalock was, like Mr. Woodward, a practicing Christian, Mr. Woodward wanted to make an extra effort to resolve their problems with plaintiff. (*Id.*)

On numerous occasions throughout plaintiff's employment at Metals Trades plaintiff failed to comply with procedural requirements of the job. For example, since plaintiff worked only part time he was asked to inform his employers in advance which days he intended to work each week. He often did not comply with this request. In addition, although he had permission to use the desks of Messrs. Woodward and Brewer, he often left them in an untidy condition. When these matters were brought to plaintiff's attention, he expressed a willingness to comply but then failed to actually comply. (Wendell Woodward at TR I-20; II-14; II-23)

At some time prior to plaintiff's being terminated, Mr. Woodward learned of the rift between Messrs. Roth-

acker and Blalock. On a few occasions Mr. Rothacker relayed messages to Blalock through their mutual friend Mr. Woodward. Mr. Woodward was personally disturbed by the conflict between his employee and his spiritual advisor. On at least one occasion Mr. Woodward told Mr. Blalock he wanted him to put an end to the "schism." (Larry Blalock at TR I-112)

It was often the case that morning prayer meetings were held at Metals Trades. Mr. Blalock attended many of these meetings; however, he was neither required to do so nor pressured into doing so. (Wendell Woodward at TR II-7) Attendance was not a requirement of his employment, nor was plaintiff subjected to any religious harassment during the term of his employment with defendant. (Larry Blalock at TR I-147)

During the course of plaintiff s employment at Metals Trades, Mr. Woodward became more and more dissatisfied with plaintiff because of what Woodward considered to be plaintiff's poor attitude toward his employers. Mr. Woodward felt that plaintiff was not following through in complying with the directions of Messrs. Woodward and Brewer. (Wendell Woodward at TR I-20) While reading the Bible, Mr. Woodward gained an insight into his problem with plaintiff when he read a passage about "feigned obedience." (Wendell Woodward at TR II-13) He realized then that plaintiff was engaging in "feigned obedience" in his work and that it was this behavior that was the source of the problem between plaintiff as an employee and his employers. (*Id.*)

Prior to his discharging plaintiff, Mr. Woodward discussed the matter of whether or not to terminate Mr.

Blalock with Mr. Brewer, who said he would concur in the termination of plaintiff if Mr. Woodward decided to so act. (Wendell Woodward at TR II-17; Arnold Brewer at TR II-56,57) Mr. Woodward also discussed the matter with Mr. Rothacker and their prayer group. (Wendell Woodward at TR II-16) Although Mr. Woodward looked to his friends for guidance in this matter, which was a difficult one for him, it was his decision, with Mr. Brewer's affirmation, to discharge plaintiff. (Wendell Woodward at TR II-9) Mr. Woodward believed that plaintiff's problem of feigned obedience manifested itself in both the secular and spiritual aspects of plaintiff's life, which, in Mr. Woodward's opinion, could not be separated. (Wendell Woodward at TR II-21,22) Two days before talking to Blalock, Woodward had made up his mind that if it came down to a point where he couldn't resolve anything with Blalock, he was going to let him go. (Wendell Woodward at TR II-18) When Mr. Woodward attempted to discuss the problem with plaintiff, he wanted to discuss plaintiff's problem in its entirety; and when the discussion began, it was Blalock who asked if it also involved John Rothacker. Since Woodward felt that one part of Blalock's life affected the rest also, he answered, "Yes." (Wendell Woodward at TR II-20 to 23) Mr. Blalock refused to talk to Woodward. (*Id.*) It was at this point that Mr. Woodward concluded that he could no longer work with plaintiff. His decision to terminate plaintiff was based on plaintiff's rebellious attitude, which, in Mr. Woodward's opinion, extended to all aspects of his life. (Wendell Woodward at TR II-21,22) He did not terminate plaintiff because of the religious beliefs he did or did not hold.

The trial court entered judgment for respondent and in so doing found that discrimination was at least a factor in Blalock's discharge, but, nevertheless concluded that Blalock failed to prove that in terminating him, Metals Trades intentionally discriminated against Blalock because of his religion or religious beliefs.

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit, which reversed on October 24, 1985. *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985). The Court of Appeals found that the case was one of mixed motivation; that although petitioner had shown that religion was a motivating factor in the discharge, the respondent had presented some evidence that it had discharged petitioner for legitimate nondiscriminatory reasons. The Court of Appeals held that after the petitioner presented evidence that one factor in the discharge was unlawful discrimination, the burden then shifted to the respondent to show by a preponderance of the evidence that petitioner would have been discharged even if there had been no discrimination.

On remand, the trial court heard no additional evidence but again found for respondent. The trial court concluded that

> . . . the defendant has proved by a preponderance of the evidence that Blalock would have been discharged at the same time absent the impermissible factor of religious discrimination.

(P. App. 27a) The trial court stated that even though religion played a part in the discharge, the petitioner was actually discharged because of the petitioner's poor job performance and insubordination towards his employers.

The case at bar was appealed again to the Court of Appeals for the Sixth Circuit, which affirmed the decision of the trial court. The Court of Appeals held by a two to one decision that the trial court's conclusion that defendant

> . . . had 'proved by a preponderance of the evidence that Blalock would have been discharged at the same time even absent the impermissible factor of religious discrimination' . . .

was not "clearly erroneous". (Per Curiam Opinion of November 30, 1987; P. App. 3a)

Petitioner filed a Petition for Rehearing which was denied on January 28, 1988 and subsequently filed this Petition for Certiorari.

———o———

REASONS FOR DENYING CERTIORARI

I. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS WHICH PETITIONER CLAIMS TO BE IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

Petitioner has raised two separate questions in his petition for certiorari with the first question being whether the Court of Appeals was proper in concluding that respondent could escape all liability if it could prove by a *preponderance of the evidence* that petitioner would have been treated in the same way in the absence of discrimination; and the second question being whether the Court of

Appeals erred by not ruling that trial court's finding was not clearly erroneous.

The first question, concerning the respondent's burden of proof, was decided by the Court of Appeals in the first appeal, by decision filed October 24, 1985. *Blalock v. Metals Trades,* 375 F.2d 703 (6th Cir. 1985) On remand, the trial court applied the burden of proof standards dictated by the Court of Appeals and found in favor of respondent. Petitioner then appealed to the Sixth Circuit Court of Appeals a second time, however, this time the only issue raised was whether the trial court's finding as to whether respondent has sustained its burden of proof was *clearly erroneous.* The issue decided in the first appeal was in no way raised or made a part of the second appeal.

28 U.S.C.A. § 2101(c) clearly provides that

> . . . any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

This Court has stated

> . . . the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period which an appeal must be taken or a petition for certiorari filed begin to run.

Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 245,248,249 (1952)

Since the Court of Appeals in the second decision in no way modified the judgment in the first appeal concerning the "preponderance of the evidence" standard, a petition for certiorari to challenge the first Court of Appeals decision had to be filed within 90 days of October 24, 1985. Since this was not done, this Court has no jurisdiction to review the first judgment.

II. THE COURT BELOW PROPERLY HELD THAT THE TRIAL COURT'S FINDING WAS NOT CLEARLY ERRONEOUS.

Petitioner has suggested that this Court should grant certiorari because the holding of trial court was "clearly erroneous" under the standards of *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 105 S.CT. 1504 (1985)

What petitioner is asking this Court to do is what the Sixth Circuit Court of Appeals has already done—i.e., to review the record to determine if the decision of the trial court was clearly erroneous. Great weight must be given to the fact that two of the three judges at the appellate level were convinced that the trial judge did not make a mistake. (P. App. 1a)

Because the findings of the trial court were based on determinations regarding the credibility of witnesses, even greater deference to the trial court's findings is required. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). Petitioner argues that the test put forth in *Anderson* is whether Woodward's statements are supported by objective evidence, however the test of *Anderson* is not whether a witness's testimony is supported by objective evidence, but rather whether it is contradicted by documents or objective evidence. The trial court found the evi-

dence was not contradicted, however, even if objective evidence does contradict a witness's testimony a finding is clearly erroneous only if it is clear that a mistake has been made by the trial court. (*Id.* at 575.)

As confirmed by the Court of Appeals, the trial court's ultimate conclusion was a permissive view, i.e., supported by the evidence.

> "Where there are two permissive views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).
>
> "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."

Id. at 574.

All the petitioner is asking this Court to do is to duplicate the trial judge's efforts as well as the efforts of the three judges in the Court of Appeals. Respondent should not have to again prove what has already been twice decided. "As the Court has stated in a different context, the trial on the merits should be 'the "main event" . . . rather than a "tryout on the road." ' " *Id.* at 575.

Petitioner has failed to present any issues which merit the attention of this Court to merely provide a second review of the findings of fact of the trial court.

———o———

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 87-1830

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In The
SUPREME COURT OF THE UNITED STATES
October Term 1987

LARRY BLALOCK,

Petitioner,

v.

METALS TRADES, INC.,

Respondent,

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATUTES

42 U.S.C. §2000e 2

II. THE PETITION FOR A WRIT OF CERTIORARI IS TIMELY

Contrary to what the respondent stated in its Brief in Opposition to the Petition for writ of certiorari, this Court does have jurisdiction to consider the Petition for certiorari. The Petition is timely. The Petition for writ of certiorari was filed within ninety (90) days of the denial of the Petition for Rehearing from the decision of the Court of Appeals that affirmed the Trial Court's ruling in favor of the respondent. The Sixth Circuit Court of Appeals in its per curiam majority decision of November 30, 1987 did not re-enter a judgment of the Court that had been previously entered nor did it revise a previous judgment in an immaterial way. See, Federal Trade Commission v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 210-214, 73 S. Ct. 245, 248-249

(1952) and Brief in Opposition, at 9. That the Court of Appeals on November 30, 1987 applied a rule of law that it had enunciated two years earlier in Blalock v. Metals Trades, 775 F. 2d 703 (6th Cir. 1985) (Blalock I) did not mean that the Court was re-entering the previous judgment.

The Sixth Circuit Court of Appeals in Blalock I reversed the district court's finding that Metals Trades had not violated Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e). The Court of Appeals ruled that the plaintiff had proved by direct evidence that one of the reasons for the plaintiff's discharge was his religion and that the plaintiff would prevail unless defendant could prove by a preponderence of the evidence that defendant would have discharged the plaintiff for non-discriminatory reasons. Plaintiff had prevailed in Blalock I and

could not, contrary to the statement of the respondent (Brief in Opposition, at 10) petition for a writ of certiorari to this Court. If plaintiff had sought a writ of certiorari after the decision in Blalock I, he would have sought an advisory opinion on the rule of law enunciated by the Court of Appeals. The plaintiff could not have sought a review of the Court of Appeals' reversal of the opinion of the district court.

After the Court of Appeals issued its decision in Blalock I, the district court stated that it was relying on the rule that was enunciated in Blalock I and again decided in favor of the defendant (respondent herein).

As the Sixth Circuit Court of Appeals had previously enunciated the rule of law, the primary issue raised by the plaintiff (petitioner herein) in the

second appeal was that the finding of the district court was clearly erroneous. However, the plaintiff also stated in his appellate brief that:

> The ease of defendant's burden in the instant case is good support for the position that the Court should revise its standard in cases of mixed motivation to require defendants to prove by clear and convincing evidence that the plaintiff would have been discharged for legitimate reasons or that plaintiff's evidence that a discriminatory motive was one of the reasons for the discharge is sufficient by itself to establish a violation of Title VII.

Brief of Plaintiff-Appellant in Blalock II, at 37.

Similarly, the petitioner in the petition for re-hearing asked the Court of Appeals en banc to re-consider the standard in cases of mixed motivation. The petitioner argued that the Court of Appeals should require defendants in mixed motivation cases to prove that the plaintiff would have been discharged by

clear and convincing evidence or, in the alternative, hold that a plaintiff proves a violation of Title VII if he or she shows that one of the reasons for the decision is impermissible. Appellant's Petition for Rehearing, at pp. 14-15. Thus, contrary to what the respondent stated (Brief in Opposition, at 9), the petitioner did raise during the second appeal the issue of what the standard in mixed motivation cases should be.

The Court of Appeals in Blalock II affirmed the trial court's decision in favor of the respondent. The Court of Appeals held that the trial court did not err in ruling that defendant had proved by a preponderence of the evidence that plaintiff would have been discharged in the absence of discrimination. This was the first decision of the Court of Appeals that was ripe for review by this

Court, as it was the first appellate decision that the petitioner lost. The Petition for a Writ of Certiorari is challenging the appellate court's use of an incorrect rule of law in affirming the trial court's decision in favor of the respondent. The petitioner is not asking the Court to re-enter a decision that was handed down two years ago. That the rule of law applied by the Court of Appeals was first enunciated two years previously did not mean that the petitioner is prevented at this time from asking this Court to invalidate it and thereby reverse the judgment of the Court of Appeals.

III. CONCLUSION

The rule of law applied by the Sixth Circuit Court of Appeals in this case is so contrary to the unequivocable language of Title VII that it must be overturned by this Court. The Court of Appeals for

the Sixth Circuit has held that defendants can escape all liability under Title VII whenever a plaintiff proves discrimination if they can persuade a court that they would have treated plaintiff in the same way in the absence of discrimination. This rule of law will make most employment discrimination cases mixed motivation cases. Defendants will argue even in cases of overwhelming discrimination that are replete with direct evidence of discriminatory motivation that they would have done the same thing even if they did not discriminate. This rule of law requires trial courts to speculate what employers would have done if they had not discriminated. How can anyone ascertain what an employer would have done if its motivation were different - if it were not biased against persons of a

particular race, color, sex or religion? The case at bar demonstrates the problem in allowing trial courts to speculate about what would have happened in the absence of discrimination, as the trial court concluded that the respondent was not liable when there was no probative evidence of what it would have done if it did not discriminate against the petitioner on the basis of petitioner's religion.

The rule of law applied by the Sixth Circuit Court of Appeals dilutes the strong and unequivocable language of Title VII. The liability provisions of Title VII (42 U.S.C. §2000e-2) make all discrimination covered by the statute unlawful and does not excuse discriminatory action if accompanied with non-discriminatory motives. See, Bibbs v. Block, 778 F.2d 1318, 1321-1322 (8th Cir. 1985) (en banc). Partial

discrimination violates Title VII.

Furthermore, this Court should grant this petition along with Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987), cert. granted, _____U.S._____, 56 U.S.L.W. 3601 (S. Ct. 1988). Both Hopkins and the case at bar involve the same issue - the rule of law in mixed motivation cases. The case at bar and Hopkins v. Price Waterhouse, supra, give this Court the opportunity to consider at one time two different standards that were enunciated by appellate courts in order to decide the rule of law.

If the Court were not to grant certiorari in the case at bar, the petitioner herein would be forever foreclosed from being able to take advantage of a rule that might be more favorable to plaintiffs than the one applied by the Sixth Circuit Court of

Appeals.

For the foregoing reasons and for the reasons set forth in the Petition for certiorari, the petition should be granted.

Respectfully submitted,

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APPENDIX F

(Excerpted from Brief for Plaintiff-Appellant, Case No. 86-4021 Sixth Circuit Court of Appeals, pp. 36, 37)

CONCLUSION

The Court below appears to have ignored this Court's mandate that the defendant prove by a preponderence of the evidence that the plaintiff would have been discharged on the date of the discharge for legitimate, non-discriminatory reasons and that the burden is a difficult one. The evidence that defendant had been somewhat dissatisfied with the plaintiff's work performance does not prove that this dissatisfaction would have been sufficient to cause Mr. Blalock's discharge. This is particularly so, when one considers that, as this Court held, that the "break in ... religious ties caused the entire web (of work, religion,

and personal relationship) ... to collapse". Blalock v. Metals Trades, supra, at 708. There was no evidence that the work relationship would have collapsed, if the religious relationship had not been severed.

The Court below made defendant's burden easy; it allowed defendant to articulate what might be considered a legitimate reason for the discharge (i.e., insubordination) without requiring proof to support the articulated expectations (such as contemporaneous statements and documents). One would think that a defendant who has been found to have made an employment decision on an unlawfully discriminatory basis, would be required at least to prove that it had told the plaintiff or others, before the plaintiff filed a discrimination charge, that it fired the plaintiff for certain, specified reasons; or perhaps be required

to have disinterested parties testify concerning the plaintiff's incompetence; or be required to show that the plaintiff had been warned that his or her work was so intolerable that he or she would be fired if the work did not improve. One would think that defendant would be required to present more evidence than a statement at trial that defendant was dissatisfied with the plaintiff's work performance or a statement to the Ohio Civil Rights Commission that the plaintiff was insubordinate.

The ease of defendant's burden in the instant case is good support for the position that the Court should revise its standard in cases of mixed motivation to require defendants to prove by clear and convincing evidence that the plaintiff would have been discharged for legitimate reasons or that plaintiff's evidence that

a discriminatory motive was one of the reasons for the discharge is sufficient by itself to establish a violation of Title VII.

Plaintiff therefore requests for the foregoing reasons, that this Court reverse and remand the case with instruction that judgment be entered for plaintiff.

APPENDIX G

(Excerpted from Appellant's Petition for Rehearing with a Suggestion for a Rehearing En Banc, Case No. 86-4021, Sixth Circuit Court of Appeals, pp. 14-15)

C. The Court Should Revise the Standard for Cases of Mixed Motivation

Plaintiff submits that because of the Trial Court's failure to require defendant to meet a difficult burden, this Court should en banc re-consider what the standard would be. We believe that this Court should, as some Courts of Appeals have required, hold that defendants must prove that the plaintiff would have been terminated for a legitimate reason by "clear and convincing evidence." See, Smallwood v. United Airlines, 728 F.2d 614, 620 (4th Cir. 1984) and Hopkins v. Price Waterhouse, 825 F.2d 458 , 471 (D.C. Cir. 1987). Cf. Haskins v. United States Department of Army, 808 F.2d 1192, 1199

(6th Cir. 1987), which like Blalock I, was written by Judge Contie. Such a standard would emphasize the difficulty of the defendant's burden which has been unheeded by the Trial Court.

This Court could, in the alternative, hold as the Eighth Circuit Court of Appeals held en banc, that the plaintiff proves a violation of Title VII if he or she shows that one of the reasons for the decision is impermissible. Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (enbanc). The Eighth Circuit Court of Appeals held in Bibbs that the Court may consider whether the plaintiff would have been terminated for legitimate reasons when considering relief. See also, Padhl v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984).

Supreme Court, U.S.
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No. 87-1830

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

LARRY BLALOCK,

Petitioner,

-v-

METALS TRADES, INC.,

Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR CERTIORARI

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SUPPLEMENTAL BRIEF TO PETITION FOR CERTIORARI

I. INTRODUCTION

Petitioner Larry Blalock is filing this Supplemental Brief, pursuant to Sup.Ct.R. 22.6, to address the impact of the recent decision of this Court in Price Waterhouse v. Hopkins, Case No. 87-1167, on the issues presented in the instant petition for certiorari.

The case at bar, like the Price Waterhouse, supra, case is one involving mixed motivation. As the lower courts in the instant case found, the petitioner proved through direct evidence that he was discharged because of his religion. Utilizing the shifting burden approach, the trial court held that the respondent proved that the petitioner would nevertheless have been fired for

legitimate reasons, although respondent presented no objective evidence that it would have discharged petitioner in the absence of discrimination. Instead, the trial court based its decision on the mere bald statement of respondent's president at trial that respondent did not discriminate against the petitioner.

Petitioner is requesting that this Court grant certiorari so that it can issue a definitive ruling on the employer's burden in mixed motivation cases in which a plaintiff proves discrimination through direct evidence or, in the alternative, remand the case for reconsideration in light of this Court's decision in Price Waterhouse, supra.

II. ARGUMENT

THE LOWER COURT ERRED IN NOT REQUIRING RESPONDENT TO PRESENT OBJECTIVE EVIDENCE THAT IT WOULD HAVE DISCHARGED PETITIONER FOR A LEGITIMATE REASON.

This Court held in Price Waterhouse, supra, that in mixed motivation cases if a plaintiff proves that an impermissible factor played a motivating (or substantial) part in an adverse employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision at the moment the decision was made solely because of legitimate reasons. The plurality of this Court stated in Price Waterhouse, supra, that after plaintiff proved that an impermissible factor was involved in the decision, the employer had to "present some objective evidence as to its probable

decision in the absence of an impermissible motive." Id., slip op. at 21. The plurality rejected "Justice White's suggestion, post at 3, that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision...." Id., slip op., at 21, n.14. Justice O'Connor supported the plurality's statement of the defendant's burden by emphasizing in her concurring opinion the difficulty of defendant's burden and by asserting that employers should not be relieved of responsibility by merely articulating at trial a legitimate basis for its decision. See O'Connor, J., concurring, slip op., at 13.

The trial court in the case at bar concluded that there was uncontradicted direct evidence that the petitioner was discharged because of a falling out with the religious leader of the president of the respondent company.

Wendell Woodward, president of respondent, admitted at trial that he told the petitioner at the time of the discharge that he was laid off until he got things resolved with Mr. Woodward's religious leader. The uncontradicted evidence was that Mr. Woodward later told the petitioner that he would consider rehiring him if he would talk about religious matters.

The trial court, without, of course, the assistance of this Court's opinion in Price Waterhouse, supra, then concluded that the employer had shown that the

petitioner would have been discharged in the absence of discrimination for legitimate reasons. There was no objective evidence to support the trial court decision.

Despite the direct evidence of the motivation for the decision to discharge at the moment it occurred, the trial court accepted Mr. Woodward's "testimony that he made the decision to discharge Blalock for strictly secular or work related problems." See Cert.Pet., at 21a, 32a. The trial court concluded that a legitimate basis existed for petitioner's discharge based only upon Mr. Woodward's unsupported statement at trial denying that he discriminated and his ex post facto testimony that he had previously had problems with the petitioner's work performance.

The trial court placed undue special credence on Mr. Woodward's self-serving statement that the discharge was based entirely on permissible motives even after the trial court and the Court of Appeals had held that the decision was based at least in part on discriminatory motives. This is a classic example of the type of evidence that the plurality of this Court in Price Waterhouse stated was insufficient to overcome the plaintiff's direct evidence of discrimination. Id., slip op., at 21, n.14. Mr. Woodward's statement of non-discrimination also constituted a mere articulation by the respondent of a legitimate basis for the discharge, that Justice O'Connor stated was insufficient to overcome direct evidence of discrimination. See O'Connor, J., concurring, slip op., at 13.

Objective evidence that should be required in mixed motive direct evidence cases, and that did not exist in the case at bar, is evidence that cannot be manufactured by a respondent in preparation for trial. Such objective evidence might include the employer's telling the employee that he might be fired because of bad work performance, a warning of poor job performance, prior discipline or telling the employee at the time of the discharge the reasons for the discharge. The respondent in the case at bar did not warn the petitioner of poor job performance, did not give him or anyone else the reason for the termination, and did not document the reasons for the discharge or dissatisfaction with job performance. Furthermore, the respondent told the

petitioner that he was satisfied with his job performance. See, Cert.Pet., at 40a.

At a minimum, a respondent who attempts to show objective evidence of a legitimate basis for the discharge must provide the discharged employee with a non-discriminatory reason for the discharge. Respondent in the case at bar did not do so. Instead, the respondent told the petitioner that he was being fired because of his religious beliefs and that he would not talk with him about his work performance. All the objective evidence negates Mr. Woodward's statement at trial that he discharged the petitioner for strictly secular reasons.

III. CONCLUSION

This Court should grant certiorari so that the Court can rule definitively that objective evidence is required for an

employer to rebut direct evidence of discrimination and to reject the inference made by the dissent in Price Waterhouse, supra, to the contrary. See, Kennedy, J., dissenting, slip op., at 2. If objective evidence were not necessary and if the employer could be relieved of responsibility by merely testifying that he/she did not discriminate, the shifting burden standard of Price Waterhouse would be gutted. An articulation of a legitimate basis for the decision would replace a requirement of proof. If objective evidence were not required, the burden of employers in direct evidence cases would be much less than that of employers in cases in which employees have established a prima facie case of disparate impact and in which employers must present evidence of business

necessity. It would be much easier for the most overt racists, sexists, and religious bigots to be relieved of responsibility for their actions than for those who did not have discriminatory motives. For instance, an employer who did not want to hire or promote blacks or women would be exonerated if he/she could fabricate for trial a credible story about the candidate's lack of qualifications.

In the alternative, this Court should remand this case for reconsideration in light of Price Waterhouse to allow the lower courts the opportunity to interpret Price Waterhouse and to adjudicate whether the respondent in this case has presented the type of proof required by Price Waterhouse.

Respectfully submitted,

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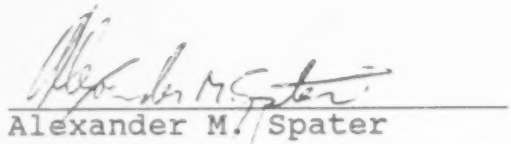
IV. CERTIFICATE OF SERVICE

I hereby certify that three copies by regular U.S. Mail have been served upon Lloyd C. Nicol, 5712 Satinwood Drive, Columbus, Ohio 43229 this 8th day of May, 1989.



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